No. 82-370

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IN THE

SUPREME COURT OF THE UNITED STATES

MARILYN CARPENTER

Appellant,

V.

JAY S. HAMMOND, GOVERNOR OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
FOR THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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August, 1982

THE QUESTIONS PRESENTED

1. May a state require military and military-related persons to meet a more restrictive test of state citizenship than other residents in order to be counted in a legislative apportionment population base.

2. May a state use a standard of state citizenship for apportionment purposes which excludes those residents who intend to leave the state at some time in the future.

3. May a state use one standard of citizenship for voter registration and a second, more restrictive standard for purposes of legislative apportionment.

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ON APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Alaska Supreme Court has yet to issue an opinion in this case. A copy of its order affirming the judgment of the Superior Court is included in Appendix A. The opinion of the Superior Court has not been published but has been reprinted in Appendix B.

JURISDICTION OF THIS COURT

This is an appeal from the final judgment of the Alaska Supreme Court holding that Appellee's July 24, 1981 proclamation of reapportionment is constitutional. Appellant challenged the proclamation on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On June 1, 1982 the Alaska Supreme Court issued an order affirming the judgment of the Superior Court on federal constitutional issues. The Court held under advisement a claim based on Alaska constitutional provisions. An opinion will not be issued until a decision is reached on the remaining state question. Appellant filed a Notice of Appeal to this Court with the Clerk of Appellate Courts of the State of Alaska on August 23, 1982.

This Court has jurisdiction under 28 U.S.C. §1257(2) to hear this appeal.

This action was originally brought under Article VI, §11 of the Alaska Constitution which permits any registered voter to bring an action to correct any error in a plan of apportionment. The jurisdictional pleading in Appellant's complaint alleges only that she is a registered voter. In its June 1, 1982 Order, the Alaska Supreme Court found that to be sufficient to meet the requirements of the Alaska constitution.

Appellee had challenged Appellant at both stages of the proceeding below on the grounds that she did not plead sufficient standing. In order to allow this Court to deal with the substantive issues of the case, Appellant has filed with her jurisdictional statement a motion to

amend her complaint to allege further jurisdictional facts. The motion is filed pursuant to 28 U.S.C. §1653 which allows defective allegations of jurisdiction to be amended in trial or appellate courts in order to avoid dismissal of suits on technical grounds.

In Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), this Court established a two-part test for standing. First, the plaintiff must have suffered injury in fact. Second, the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Appellant has suffered injury in fact from Appellee's actions. She resides in a district which is underrepre-

sented in the apportionment plan. She also has suffered injury from Appellee's treatment of the military. The plan excludes from the apportionment population base 1,480.5 military and military-related persons who reside in Appellant's house district and 2,021.5 persons who reside in her senate district. Appellee's failure to count those persons directly affects the degree and quality of Appellant's representation in the legislature and dilutes the weight of her vote in legislative elections.

In Reynolds v. Sims, 377 U.S. 533 (1964) this Court held that equality of political representation in state legislatures is protected by the equal protection clause of the Fourteenth Amendment.

PROVISIONS INVOLVED

Appellant has challenged the constitutionality of the Proclamation of Reapportionment and Redistricting issued by Appellee on July 24, 1981. The Proclamation is reprinted in Appendix D.

The Proclamation adopts the report of the Governor's Advisory Board on Reapportionment which includes an apportionment base developed according to the citizenship criteria challenged by the Appellant. The portion of the report dealing with the military is reprinted in Appendix E.

Appellant contends that the citizenship criteria adopted by Appellee and its application to military and military-related persons violates Section I of the Fourteenth Amendment to the United States Constitution which states:

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This action was originally brought under Article VI, Section II of the Alaska Constitution which provides:

"Section II. Enforcement. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform his reapportionment duties or to correct any error in redistricting or reapportionment. Application to compel the governor to perform his reapportionment duties must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting or reapportionment must be filed within thirty days following the proclamation.

> Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts."

STATEMENT OF THE CASE

Appellee Jay S. Hammond is the Governor of the State of Alaska. On July 24, 1981 he issued a Proclamation of Reapportionment and Redistricting for the Alaska Legislature. The plan contained in the Proclamation uses a "state citizen" population base of 369,117.2 - 31,363.8 fewer persons than the number of persons enumerated in the 1980 United States Census. The lower number resulted from adjustments made to the census figures to remove certain military and military-related persons from the population base.

Using Appellee's state citizen population base, the population variances

among the districts range from 4.0 percent overrepresented to 5.8 percent underrepresented in the State Senate and from 4.17 percent overrepresented to 5.8 percent underrepresented in the State House. When the 1980 census figures are used as a population base, however, the variances range from 11.3 percent overrepresented to 31.1 percent underrepresented in the State Senate and from 11.3 percent overrepresented to 60.6 percent underrepresented in the State House.

The adjustments to the census figures were based on two studies commissioned by the Governor's Advisory Reapportionment Board. The first attempted to estimate the number of nonresidents who were likely to be included

in the census count and their potential effect on reapportionment. After studying aliens and various classes of potential non-residents, including fish processing employees, lumber camp workers, felons, students and oil camp employees, the Advisory Board concluded that only military personnel and their dependents should be subjected to further inquiry. The other classes were dismissed as insignificant to the reapportionment process or the board considered the complexity and cost of further inquiry to be prohibitive.

Once military personnel and their dependents had been singled out for a more intensive reivew of their citizenship qualifications, a second study was conducted. It's purpose was to determine the number of military personnel and

dependents at various locations who were state citizens. The study consisted of a questionnaire which was distributed to a sampling of military personnel to survey their citizenship characteristics.

For purposes of determining citizenship, all military personnel who had registered to vote in Alaska were treated as Alaska residents. In addition, all personnel who currently considered their home to be in Alaska and were planning to make Alaska their home when they left the military were treated as citizens. Military personnel who considered Alaska to be their home, but had not registered to vote and did not plan on living in Alaska following completion of their military service were not counted as state citizens. Military dependents were treated as state citizens only if they

had registered to vote in Alaska or if they considered Alaska to be their home and intended to live here in the future.

The questionnaires were mailed to a random sample of personnel stationed at the seven (7) largest military installations in Alaska. Based on the responses, "non-resident population coefficients" were determined for each installation and the surrounding off-base areas. These figures were used to reduce the military and dependent populations in the census enumeration districts at each location.

On August 24, 1981 Appellant filed this action in the Superior Court. Appellant challenged the constitutionality of the citizenship standard used for apportionment and its application to military personnel and dependents.

On March 26, 1982 the Superior Court

issued its decision. The Court upheld the constituionality of the citizenship standard used by Appellee but required that the non-residency factor dervied from it be applied at all military installations rather than just the seven largest. The Court's order resulted in the further reduction of the population base by 2,066.91 military personnel. This necessitated minor adjustments to the boundaries of three house districts and two senate districts.

The decision of the Superior Court was appealed to the Alaska Supreme Court. On June 1, 1982 the Alaska Supreme Court issued an order affirming the judgment of the lower court on all federal constitutional issues. The Court held under advisement a question related to state constitutional issues. An opinion will

not be issued until after final determination of the remaining state issue which is independent of the questions presented here.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. This case presents almost the converse of the issues dealt with by this Court in Dunn v. Blumstein, 405 U.S. 330 (1972). That case involved discrimination by a State against the voting rights of residents who had recently moved into the State. This case deals with discrimination by a State against residents who intend to move out of the State at some time in the future.

Prior to the Alaska Supreme Court's decision in this case, five federal and state courts had considered the constitutionality of the citizenship test used in Appellee's apportionment plan. All five had concluded that it was unconstitu-

tional and all five reached that conclusion in unanimous opinions. The Alaska Supreme Court stands alone in affirming it.

The citizenship test used by Appelle requires that, in addition to presently considering himself to be a resident, an individual must also intend to remain a resident indefinitely. Anyone who intends to leave the state at some point in the future and not return is ineligible for state citizenship under this test. Appellee used the test to exclude 31,363.8 military and military-related persons from the apportionment population base. The Superior Court, using the same standard exluded an additional 2,066.91 military personnel.

In numerous cases during the sixties and seventies, including Reynolds v.

Sims, 377 U.S. 533 (1964), Carrington v. Rush, 380 U.S. 89 (1965), Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), Evans v. Cornman, 398 U.S. 419 (1970) and Dunn v. Blumstein 405 U.S. 330 (1972), this court established the principle that every citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in a jurisdiction. Before an individual's right to participate in the electoral process can be restricted, the purpose of the restriction and the state interest it serves must meet close constitutional scrutiny. In Dunn v. Blumstein, 405 U.S. 330 (1972), this Court held that such restrictions can only meet close constitutional scrutiny if they are appropriately defined, uniformly applied and necessary to preserve

the basic conception of a political community.

Appellee's standard invidiously discriminates against the more mobile elements of the population. No matter how long a person remains in the community or how deeply involved a person becomes in community affairs or how strongly a person feels that Alaska is his home, he will never be a citizen under Appellee's test if he plans to leave at sometime in the future. Where one will make their home in 20 years or even 2 or 3 years is an unrealistic constraint on the concept of citizenships for voting purposes in our highly mobile society. It is particulary unrealistic in Alaska in light of what the Alaska Supreme Court itself referred to in Egan v. Hammond, 502 P.2d 856

(Alaska 1972), as the state's "chronic mobility".

But even in less transient states, courts have found the future intent test to be an unrealistic constraint on the concept of citizenship. In Newburger v. Peterson, 344 F. Supp. 559 (D.N.H. 1972), a three-judge court considered the constitutionality of a New Hampshire election law which disqualified persons who intended to leave town at a fixed time in the future from voting in municipal elections. The court held that the test offended the equal protection clause of the Fourteenth Amendment and concluded that, in this day of widespread planning for change of scene and occupation, it could not see how a requirement of permanent or indefinite intent to stay in one place was relevant to responsible citizenship.

The court found that there were less restrictive alternatives to the requirement that one must say that he will always -or definitely- live in a particular town.

In Ramey v. Rockefeller, 348 F. Supp. 780 (E.D.N.Y. 1972) another three-judge court addressed the constitutionality of applying future intent requirements to voting eligibility. The court found that the only constitutionally permissible test under the equal protection clause is one which focuses on the individual's present intention and does not require him to pledge allegiance for an indefinite future. It is sufficient if an individual intends to make a place his home for the time at least.

Two state supreme courts have also considered the constitutionality of

future intent requirements for voting.

In Lloyd v. Babb, 251 S.E. 2d 843 (N.C. 1979), the North Carolina Supreme Court found that the test, if it were imposed on all citizens, would go too far in restricting the vote to the more immobile elements of the populace. And the New Jersey Supreme Court in Worden v. Mercer County Board of Elections, 294 A.2d 233 (N.J. 1972) noted that even residents of limited duration may have a strong sense of community involvement, may be affected by the outcomes of local elections and may be concerned about and aware of community issues, values, and personalities. It found the future intent test unsupported by any compelling state interest in its application. Both courts held the test to be in violation of the equal protection clause.

Although the four cases cited above involved students who intended to leave their college communities following graduation, the principles enunciated apply with equal force to military personnel as well. In fact, the Newburger Court specifically noted the hardship the test would work on military personnel station on a tour of duty in New Hampshire. And in a case closely on point, the New Jersey Superior Court's Appellate Division specifically held that Worden v. Mercer County invalidated future intent requirements for the military as well as for students. Marks v. Township of New Hanover, 308 A.2d 24 (N.J. Super. 1973), is particulary noteworthy because it involved the right of military personnel and members of their households to be counted as bonda fide residents in a

determination of the number of inhabitants for the purpose of fixing the size of the municipal governing body - just the type of representational question at issue here.

The Alaska Supreme Court's Order is so contrary to the weight of decided caselaw and adversely affects the fundamental rights of so many people that this Court should not allow the decision to stand.

2. Attempts by states to discriminate against military personnel in the exercise of their political rights are not new to this Court. In Carrington v. Rush, 380 U.S. 89 (1965), the Court invalidated a provision of the Texas Constitution which denied voting residence to military personnel stationed in Texas who had not established a Texas voting residence

prior to entering the service. While the Court recognized the right of States to require voters to be bona fide residents, it held that military personel must be afforded an equal opportunity for political representation. It noted that there is no indication in the Constitution that occupation affords a permissible basis for distinguishing between qualified voters within a state.

This court applied that same reasoning to apportionment in Davis v. Mann, 377 U.S. 678 (1964) and Mahan v. Howell 410 U.S. 315 (1973). Discrimination against the military in apportionnment plans, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.

The Alaska apportionment plan, however, does discriminate against mili-

tary personnel and members of their households. They were held to a higher standard of citizenship than other residents in the establishment of the plan. Only the military were required to meet the future intent test in order to be counted. In its opinion, the Superior Court acknowledged the holding in Newburger v. Peterson 344 F. Supp. 559 (D.N.H. 1972), which declared the future intent test unconstitutional. But the Court concluded that the unconstitutional standard could be applied to military personnel because they were present in Alaska under the constraints of military assignment and unable to freely exercise their choice of domicile. That is exactly the type of discrimination based on the nature of military employment which Carrington, Davis and Mahan prohi-

bit. Appellee has not shown that the military and military-related persons who were excluded do not meet bonda fide residency requirements. He has only shown that they do not meet the more restrictive residency test which was applied exclusively to the military.

Even if legal compulsion were a valid justification for the application of a higher standard to military personnel, Appellee has no justification for its application to military-related persons who are not members of the armed services. All are here voluntarily and all are legally free to leave at any time. Since they are already completely free of the constraints of legal compulsion and can freely exercise their choice of residence, any inquiry into their future intent subjects them to a

higher standard than other residents not in the state under legal compulsion. Yet the exclusion of thousands of military-related persons was permitted by the Alaska Courts under the legal compulsion rationale.

Appellee also contends that the counting of all registered military voters, regardless of whether or not they met the future intent test, was an additional safeguard which protected bona fide military residents. Actually, all it does is create additional equal protection problems within the military class itself. Military and dependents who were registered to vote were automatically included in the population base. Thus, anyone who met the elections code residency requirements and had registered to vote was counted. However, those per-

sons who met the elections code residency requirements but had not registered were excluded unless they also met the more restrictive future intent test. Military personnel with identical qualifications could have been included or excluded based solely on whether or not they happened to have been registered on the day of the survey.

3. Appellee's use of a future intent test for apportionment has established two different residency standards for elections purposes in Alaska. Elections officials testified that in order to register to vote an individual need only have a present intent to be a state resident. Under that standard, military personnel are routinely registered without any inquiry into their future plans. But for apportionment a different standard

applies. To be represented in the legislature an individual must demonstrate an additional intent to remain indefinitely. Thus, military personnel who consider Alaska to be their home, but who intend to leave at a future time, can register to vote in legislative elections but are not entitled to be counted in the apportionment of the legislature.

In Gray v. Sanders, 372 U.S. 368 (1963), this Court held that once a State chooses its class of voters and specifies their qualifications, there is no constitutional way by which equality of voting power may be evaded. But appellee has done percisely that. The residency provisions of the election code have been rejected in favor of Appellee's own arbitrary test, thereby denying represen-

tation to those otherwise eligible to vote but unable to meet restrictive apportionment standard.

In Dunn v. Blumstein (1972), this Court held that any test of domicile for elections purposes must exclude only those whose exclusion is necessary to preserve the basic conception of a political community. Under strict scrutiny a restriction on the right to vote must be struck down unless a state can demonstrate that it is necessary to further a compelling state interest, and is the least drastic means available to further that interest.

Appellees test clearly fails to pass strict scrutiny. The future intent test is not necessary to preserve the basic conception of the Alaska political community. For many years the less restric-

tive standards of the elections code have accomplished that goal. Appellee has yet to show why a higher standard is so compellingly necessary for legislative apportionment, when a much less drastic standard is sufficient for legislative elections. It is difficult to see any state interest, must less a compelling one, in using two different residency tests for elections purposes.

CONCLUSION

This case involves substantial constitutional questions regarding equal protection and the political rights of military personnel and members of their households. In this highly mobile nation there are few groups more mobile than servicemembers and their families. This mobility and their short-term residencies make them particulary vulnerable to

political discrimination by the States. If this Court allows the decision of the Alaska Supreme Court to stand, it could be interpreted as a retreat from the position take by the Court in Carrington v. Rush, 380 U.S. 89 (1966), that military personnel are fully entitled to the rights of state citizenship protected by the Fourteenth Amendment. More immediately, it will allow the State of Alaska to continue its discriminatory practices and perpetutate the underrepresentation of military personnel and those other Alaskans who reside in election districts with them.

Respectfully submitted,

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August, 1982

APPENDIX A

ORDER OF THE ALASKA SUPREME COURT

ISSUED ON JUNE 1, 1982

THE SUPREME COURT OF THE STATE OF ALASKA

MARILYN CARPENTER,	)	
Appellant,	)	
vs.	)	File No. 6728
JAY S. HAMMOND, Governor of the State of Alaska,	)	
Appellee.	)	

Before: Burke, Chief Justice, Rabinowitz, Connor, Matthews and Compton, Justices.

O R D E R

1. Appellee's motion to dismiss certain portions of this appeal, upon the ground that appellant lacks standing to raise some of the issues set forth in appellant's points on appeal, is denied.

2. Appellant's claim that the inclusion of Cordova in House District 2 and Senate District B violates Article VI, Section 6, of the Alaska Constitution remains under advisement. Otherwise, the judgment of the superior court is affirmed.

3. Pending our determination of the issue remaining under advisement, described in Paragraph 2 hereof, the Governor's 1981 legislative reapportionment and redistricting plan is approved, as an interim measure, for elections to be held in House District 2 and Senate District B in 1982.

4. An opinion will follow our determination of the remaining issue.

By direction of the Court, IT IS SO ORDERED.*

Done at Anchorage, Alaska this _____ day of August, 1982.

CLERK OF THE APPELLATE COURTS

By: _____
Robert D. Bacon, Clerk

* Rabinowitz, Justice, dissenting. I dissent from Paragraphs 2 and 4 of the court's order. I would enter an order affirming the reapportionment board's inclusion of Cordova in House District 2 and Senate District B and thus would affirm the superior court's judgment in this respect as well.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MARILYN CARPENTER, Plaintiff,	)	
vs.	)	Case No. 3AN-81-5839 Civil
JAY S. HAMMOND, Governor of Alaska, Defendant.	)	

FINAL JUDGMENT

The trial in this action commenced on March 8, 1982, before the Honorable Daniel A. Moore, Jr. and concluded on March 17, 1982. Final arguments were held on March 22, 1982, and the parties filed proposed findings of fact and conclusions of law. Plaintiff was represented by Attorneys Holli I. Ploog and Francis M. Flavin. Defendant was represented by Attorney Thomas M. Jahnke.

The court having fully considered the testimony of the witnesses, exhibits and pleadings filed, and the arguments of counsel herein rendered its decision in this matter.

I. Introduction

The defendant, Jay S. Hammond, is the duly elected Governor of the State of Alaska. As such he is charged with the duty of appointing a Reapportionment Advisory Board, issuing a proclamation of reapportionment and redistricting and other duties prescribed in the Constitution and laws of Alaska. On July 10, 1981, the Reapportionment Advisory Board submitted a Reapportionment and Redistricting Plan for the Alaska State Legislature to the Governor. On July 24, 1981, the defendant issued a Proclamation of Reapportionment and Redistricting for

the Alaska Legislature.

The plaintiff is a citizen and voter of the United States and the State of Alaska and is entitled to vote for members of the House of Representatives and the Senate of the State of Alaska. Plaintiff brought this action, pursuant to Article VI, §11, of the Constitution of the State of Alaska, to compel the Governor to correct alleged errors contained in the plan of redistricting issued on July 24, 1981.

Two basic issues are presented in the action. First, did the Governor use permissible methods in identifying and excluding certain non-residents from the apportionment base. Secondly, does the Cordova-Inside Passage election district (House Election District Number 2) conform to the constitutional requirement

that a district be compact and that it contain as nearly as practicable a relatively integrated socio-economic area.

II. Exclusion of Non-Residents

Standard of Review

The plaintiff challenges the constitutionality of the Governor's exclusion of non-residents in three areas of decision: (1) foregoing the detailed study of civilian groups thought to contain large numbers of non-residents when the military was so studied, (2) declining to exclude from the reapportionment population base certain numbers of non-resident military in remote areas of the State, and (3) using a survey questionnaire, which the plaintiff claims does not meet constitutional standards, to determine the residency characteristics of the military.

The primary contention of the plaintiff is that these decisions deny her and other voters the constitutional protections guaranteed by the equal protection provisions of the U.S. Constitution. In an equal protection analysis, the degree of scrutiny required depends on whether the actions taken involve a suspect classification or touch on fundamental interests. The U.S. Supreme Court has held that "the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges... [a]nd before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." Evans v. Cornman, 398 U.S. 419, 422 (1970). On this basis, the court has struck down

requirements that a would-be voter had been a resident of the state for a year, Dunn v. Blumstein, 405 U.S. 330 (1972), and also struck down a law prohibiting a member of the armed forces who moved to a state during military service from voting in that state, Carrington v. Rash, 380 U.S. 89 (1965).

The defendant argues that reapportionment is different from voter registration, and cites Egan v. Hammond, 502 P.2d 856, 869 (Alaska 1972) for the proposition that a lesser degree of precision is required for apportionment than is required in dealing with the strict right to vote. While it is true that many factors including the general mobility of the population made mathematical precision impossible in reapportionment, the U.S. Supreme Court has recognized

that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 555 (1964). In a later decision the court noted that "state apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court." Kramer v. Union Free School District, 395 U.S. 621, 626 (1969).

Reynolds stated that "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. at 579. The court declined to lay

out any constitutional standards, preferring to lay the groundwork for "developing a body of doctrine on a case-by-case basis." 377 U.S. at 578. Later cases developed some principles such as finding that a built-in bias against more populous counties is unconstitutional. WMCA Inc. v. Lomenzo, 377 U.S. 633 (1964). The court also found that states are not required to "include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base." Burns v. Richardson 384 U.S. 73, 92 (1966). The court had earlier ruled, however, that under-representation of a district simply because it contained large numbers of military and military-related personnel was unconstitutional. Davis v. Mann, 377 U.S. 678 (1964). The

Alaska Court specifically approved excluding military non-residents from the apportionment base once a constitutionally permissible method for determining their number was devised. Groh v. Egan, 526 P.2d 863, 872 (Alaska 1974).

While these cases provide some guidance as to what is permissible and impermissible in reapportionment, they do not provide clear standards for culling out non-citizens from the reapportionment base. The language of equal protection analysis in Evans and Kramer, supra, appear to require the application of a strict scrutiny standard to whatever means of reapportionment are used.

In claiming that the plaintiff has the burden of proof, the defendant argues in effect for the rational basis test of the equal protection analysis, citing

Egan v. Hammond, 502 P.2d at 873. This case, and the U.S. Supreme Court cases on which it is based, all deal with the assertion of discrimination in the creation of multi-member districts allegedly submerging the interests of groups within the districts. That is not the issue in the present case. Where, as in this case, defects are alleged in the accuracy of the count of citizens making up certain districts, the reasoning of Evans and Kramer would appear to require the application of a strict scrutiny test. The plaintiff having made out a prima facie equal protection case, the burden falls on the defendant to show a compelling state interest and the use of the least restrictive alternatives to accomplish that state interest.

The defendant has met the first part

of the test, showing a compelling state interest in defining the population properly to prevent dilution of voter influence. Reynolds v. Sims, supra. The question to be applied to each of the three decisions (to use the questionnaire inquiring about future intent, to poll only military, and to poll only selected military sites) would be whether the defendant's methods were sufficiently precise in achieving the desired purpose and whether there were less restrictive alternatives, i.e. alternative methods which would place a lesser burden on the protected activity, the right to vote.

III. Findings of Fact

A study conducted by Dr. John A. Kruse, of the Institute of Social and Economic Research, of the University of Alaska (ISER) concluded that the only

groups of potential non-residents present in the population in significant numbers were military personnel and their dependents. Dr. Kruse recommended a study be conducted of this group at seven (7) installations in the State, namely Fort Richardson and Elemendorf AFB in Anchorage, Fort Wainwright and Eielson AFB in Fairbanks, Fort Greely at Delta Junction, the Kodiak Coast Guard Station, and the Adak Naval Base.

Although the initial study of fish processing employees indicated significant numbers of non-residents in the Aleutians and Bristol Bay, Dr. Kruse recommended no survey be conducted of this group because of the anticipated difficulty in conducting such a survey, and because a substantial census bureau undercount of this workforce was expected

due to several factors:

a. Lack of preparation by the census bureau created the likelihood that some fish processing units, many of which are mobile, floating units, would be missed by census enumerators or that groups within the units would be missed;

b. The census bureau was not able to obtain from the companies a list of employees with which it could organize the count and against which it could verify the coverage of the enumeration; a list is an essential tool in locating all the persons in a unit;

c. Pocessing unit managers would, according to knowledgeable sources contacted by Dr. Kruse, be reluctant to permit disruptions of their operations to facilitate census enumeration;

d. The work shifts, group living

and dining arrangements would complicate the task of identifying and interviewing each individual at a fish processing unit;

e. Language barriers were expected to prevent a full and a complete enumeration;

f. Low pay for census enumerators and the poor qualifications of persons employed as enumerators would reduce the chances that the enumerators would take the initiative to overcome these difficulties.

Fish processing workers who, in a box on the special census form provided them, gave a home address other than the fish processing unit were counted at that other address, be it in another state or another part of Alaska. The census forms given military servicemembers and other

civilians (except lumber and oil base camp workers) lacked such a box; those persons were counted at those places where they were physically located.

It would not have been an acceptable demographic research technique to make deductions from such an unreliable census count; even if the numbers deducted were based on reliable research data, the result of the subtraction would contain all the inaccuracies of the census count.

Because of the likely census undercount, deduction of some non-resident proportion of the census population would work a double elimination: There would have been removed from the population base persons who had never been counted in the first instance.

Dr. Kruse, as part of a post-census study of census procedures, certified

that all the problems anticipated with the census enumeration of fish processing workers did indeed occur.

Group quarters census data, which first became available four months after the Governor promulgated his reapportionment plan, verified Dr. Kruse's prediction of a substantial undercount of fish processing workers: Whereas 2,472 workers were reported to be employed and housed in group quarters on the Aleutian Chain and in Bristol Bay, the census bureau counted only 760.

The means by which the Governor might have surveyed fish processing workers to determine the number of non-residents presented substantial difficulties that would have undermined the reliability of the results. The same problems applied to lumber workers,

making any survey of lumber workers difficult and the results unreliable.

There were no other readily-identifiable groups with numbers and concentration of residency characteristics that would influence Alaska's legislative apportionment, except the military.

The Governor deducted from the reapportionment population base those numbers of non-resident military personnel and dependents who resided at or near the seven largest military installations in Alaska, after surveying a scientific sample of the personnel at those seven sites. It was not recommended that all of the military installations be surveyed because it was determined that there were not significant numbers of military personnel and their dependents at installations other than the seven selected.

There were approximately 2,067 non-resident military personnel at smaller installations on the Aleutians, in Bristol Bay, in Interior Alaska and in Southeast Alaska. The largest numbers of non-residents were at Shemya and King Salmon in District 26 (851), Galena in District 24 (259), Juneau (195), Sitka (137), Ketchikan (133) and Clear in District 17 (100).

Had all these numbers of non-resident military, and those at other locations not listed in the preceding paragraph, been deducted from the population base, that population base would have become 367,050 and the ideal district size would have become 9,176. See Appendix I, attached hereto.

Under this scheme, the most over-populated district would be District 25

with 9,684 persons (+5.53%); the most underpopulated district would be District 26 with 8,628 persons (-5.97%); and the combined variation from the ideal district size would be 11.50%. See Appendix II, attached hereto.

Military personnel are compelled, under penalty of military discipline or criminal liability, to live in Alaska. Most military personnel and their dependents live on self-contained, insular reservations.

Civilians and their dependents vote at a rate 5.6 times greater than military personnel and dependents. In the 1980 general election in Alaska, which included the election of the President of the United States, voter turnout in civilian precincts as a proportion of total population, was approximately 455. In

military precincts the comparable figure was 8%.

The proportion of military claiming Alaska to be their home was calculated from responses to three questions: First, "Do you consider your home to be in Alaska or some other state?" Second, "Do you plan to make your home in Alaska or some other state when you leave the military?" Third, "Are you registered to vote in the State of Alaska?" Persons who answered "Alaska" to the first two questions or who were registered voters, were counted as Alaska residents, yielding an average residency factor of 25%.

IV. Conclusions of Law

Courts have declared the use of a future intent test for voting unconstitutional as applied to certain groups, e.g.

college students in Newburger v. Peterson, 344 F. Supp. 559 (D.C. N.H. 1972). Because military personnel are in the unique position of being in the state under legal compulsion, however, and because there is an established pattern of lack of participation by military personnel in the political life of the community where they are stationed, it was constitutionally permissible to inquire about their intent to establish a home in the state once they would be free of the constraints of military assignment. An additional safeguard was provided by first counting all registered voters among the military as residents for purposes of reapportionment.

The alternative of counting all military and dependents as residents for purposes of reapportionment, which the

plaintiff suggests, would place a much greater burden on the protected activity, the right to vote, by diluting the vote of some residents. This is because voting districts near military reservations would include an admittedly large group of military who "exercise an option to be non-Alaskans despite their physical presence here." Groh v. Egan, 526 P.2d at 872.

Because of the formidable difficulties in making an accurate count of fish processing and lumber workers, and because of the likelihood of a census undercount and reallocation of many of those workers, it was constitutionally permissible to exclude identifiable non-resident military personnel and dependents from the reapportionment population base while including non-identifiable

members of other groups. The only alternative was to do a technically problematic survey with the real possibility of a double elimination of non-residents. The Governor was justified in deciding this alternative might well have placed a greater burden on the protected activity.

Because of the difficulty of access to remote military sites, many of which are tightly secured intelligence posts, and because of the wide dispersal and relatively small size of these remote sites, it was constitutionally permissible for the Governor to forego study of the military at these remote sites. However, because the consistency of results of the surveys done at larger installations made it feasible to apply these results to the smaller installations, such a course of action would

have been less restrictive than including all the military at remote sites in the population as the Governor did. The non-resident population of the smaller sites should therefore have been calculated on the basis of available survey data and excluded from the population base. Analysis of the population figures shows that such a procedure would materially affect only District 26. See Appendix F. Because the deviation from ideal district sizes would exceed 10% once the formula was applied to the remote sites, and because the Governor has demonstrated no rational basis for the variations in Districts 25 and 26, an adjustment must be made to balance the sizes of the two districts and bring them within the constitutionally permissible deviations from the ideal district size. Groh v.

Egan, 526 P.2d at 882. The court suggests that such an adjustment could be made by simply including Platinum (population 55) and Goodnews Bay (population 168) within District 26.

V. Cordova-Inside Passage District

The plaintiff claims that including Cordova in House Election District 2 violates the constitutional requirements that house districts be compact and contain relatively integrated socio-economic areas. Since there is no due process or equal protection argument here, the standard of review is whether the configuration of District 2 is "reasonable and not arbitrary." Groh v. Egan, 526 P.2d at 863, 866. "Particularly where specific objections have not been presented to us, we do not believe it appropriate to substitute out [sic]

judgment for that of the constitutionally empowered authority regarding the wisdom of delicate adjustments to be made in political boundaries." Id. at 889.

VI. Findings of Fact

Cordova is geographically located in Prince William Sound, but Cordova is a waterlocked port, i.e. its port serves its people and community and no others; there is no transport link to another community through that port. Imports of general commodities to Cordova come via four conveyances: Sealand freighter, the Alaska Ferry System, Alaska Airlines and Alaska Aeronautical Industries (AAI) air taxi. Up to 90% of the imports (10,000 of 11,000 tons) come to Cordova on Sealand from Seattle via Kodiak; up to 9% of the imports (1000 of 11,000 tons) come to Cordova from Anchorage warehouses via

the Glenn and Richardson Highways to Valdez where the trailers are loaded on an Alaska State Ferry. Cordovans also rely on the Ferry as the sole means for transporting vehicles to and from Cordova. A very small percentage of imports to Cordova come via Alaska Airlines from Anchorage or Seattle, or on AAI from Anchorage.

Cordovans are all but totally dependent, directly or indirectly, on the fishing industry for their livelihoods. Only the government sector does not look to the fishing industry for its payroll.

Cordova's fishermen harvest salmon and crab which are processed in Cordova's four major canneries. The fishing gear employed is purse seine and drift gillnet gear. Over the last decade approximately 85% of the salmon caught in Prince

William Sound have been caught by purse seiners. The remainder of the catch has been on drift gillnet gear. To the same extent that fishing dominates the Cordova economy, Cordova fishermen dominate the Prince William Sound fisheries. Nearly all the fishermen who fish the Sound are either Cordova residents or non-local fishermen who use Cordova as a base of operations. Of the 914 limited entry permits issued for the Sound salmon fisheries, over 50% are held by Cordova residents; over 28% are held by non-Alaska residents; less than 5% of the permits are held by Valdez residents; less than 1% are held by Whittier residents; and less than 1% are held by Seward residents.

Cordova's fish processing industry is controlled by interests from outside

the Sound. Two of the four largest plants are owned by Japanese concerns. One is owned by the Juneau-based regional Native corporation, Sealaska Corporation. The fourth is owned by the Anchorage-based regional Native corporation, Chugach Natives Inc., a substantial portion of whose shareholders live in Cordova.

Virtually all of Cordova's fishing harvest, which is the vast majority of Cordova's export tonnage, is shipped to Seattle or the Far East via Kodiak.

Cordova has minimal ties and shares few common concerns with Seward. Both are served by the State Ferry System on an intermittent basis, but there was no evidence adduced of intervisitation by this means. Both have fish processing plants, but Seward's does not predominate

in the local economy like the Cordova plants in that city's economy. There is very little fishing out of Seward; there are approximately 50 limited entry permit holders (all fisheries) in Cordova. Seward's port imports steel and containerized cargo for the Railbelt and North Slope. There is due to come on line in Seward, in the near future, a coal export facility and a grain export facility. Seward is the southern terminus of the Alaska Railroad. There are no such imports or facilities in Cordova.

Cordova has minimal ties and shares few common concerns with Whittier. Both communities are stops on the state ferry system, but the characters of their ports are vastly different. Whereas, Cordova is a fishing port with no imports for trans-shipment to other communities.

Whittier's port handles more tonnage of general and industrial commodities than any other port in the State; with its rail link, it acts as a port for Anchorage.

Despite their geographic proximity, there are few links between Cordova and Valdez. The evidence showed the following ties:

a. Bowling tournaments have involved both Cordova and Valdez bowlers;

b. their Moose Lodges and Elks Clubs have gathered on occasion;

c. there is interscholastic sports competition between the cities' high schools;

d. approximately 9% of the general commodities imported into Cordova each year (1,000 of 11,000 tons), are shipped by highway from Anchorage warehouses,

through Valdez, and on to Cordova on the Alaska Ferry System.

e. air service is available between Cordova and Valdez three to seven times per week, depending on the season. The traffic peak is in the third quarter, the height of the fishing and tourist season, when, in 1979, two tons of cargo and 300 people were carried between Valdez and Cordova. In the fourth quarter, after the peak, one ton of cargo and 100 passengers were carried between Valdez and Cordova.

Historically, there has been intense rivalry between Valdez and Cordova. At the turn of the century, the cities competed to become the terminus of the railroad serving interior copper mines. There was a bitter fight between Valdez oil interests and Cordova fishermen over

the Trans-Alaska Pipeline System tanker terminal. Litigation is pending in federal court between Valdez oil interests and Cordova fishermen (as intervenor defendants with the Governor) over Alaska's tanker safety legislation.

The economic bases of Cordova and Valdez could not be more divergent. While Cordova relies almost entirely on fishing, Valdez is a gateway port which handles industrial commodities and oil, the latter in enormous volumes. The tax base which the oil terminal affords Valdez gives the city enormous credit against which it has drawn to amass a general obligation bonded debt 40 times as high as Cordova's debt.

All communities of the Inside Passage, with the exceptions of Haines and Skagway, are waterlocked ports whose

imports reach only the single community and its people. They rely totally on the State Ferry and coastal freighters out of Seattle (whose cargo may be transhipped from a larger waterlocked port) for their supply. They rely on the Ferry to transport vehicles and on air carriers to transport passengers. Like Cordova, there is no overland link.

The economic base of the Inside Passage is fishing. Witnesses for both the plaintiff and the Governor identified a number of issues of great concern to fishermen in Cordova, Southeast Alaska and the rest of the State. A Cordova fisherman, Bob Blake, identified the following issues as important: Port development, the raw fish tax, water quality, forest management, and fish processing quality control. Fisherman and

Sealaska Corporation chairman, Byron Mallott, identified the following issues: Limited entry, foreign processors, fish processing quality control and plant safety, vessel safety and State fisheries loan programs.

Commercial timber plays an important, subordinate role in the economy of Southeast Alaska. To date it has not played such a role in Cordova, but there is both interest and potential. The key interested parties in Cordova are the Eyak Native Village Corporation and its regional counterpart, Chugach Natives, Inc. Both of these, Prince William Sound and Cordova concerns, are investigating timber potential in Southeast Alaska, in concern with Sealaska Corporation and local native village corporations.

Cordova is a member of the South-

eastern Conference, a formal lobbying organization for Southeast Alaska municipalities. Among its member communities, in addition to Cordova, are Yakutat, Haines, Skagway, Angoon, Kake, Craig and Klawock.

There is daily jet service between Cordova and Southeast Alaska, both northbound and southbound. There is direct service between Cordova and Yakutat, and one in Juneau, Sitka or Ketchikan, there is both scheduled and charter air-taxi service to the other communities in District 2.

VVI. Conclusions of Law

Alaska Constitution Article VI, Section 6, requires that election districts be "compact". It does not require that election districts be the most compact that could possibly be

devised; considerations of population equality, socio-economic integration, geographic barriers and municipal boundaries may militate against the most compact configuration. The goal to be achieved by the compactness requirement is effective legislative representation, which occurs when persons and communties with substantially like backgrounds and interest, usually but not always in a single region, are joined in a political unit to elect the person of their choice. Effective transportation and communication systems may make a far-flung district functionally compact, especially when the residents of the district have common interests and take advantage of the transportation and communication systems to develop their policy positions and make their views known to their legislator.

District 2 does not violate the requirement of compactness.

Alaskan Constitution Article VI, Section 6, requires that a district "contain as nearly as practicable a relatively integrated socio-economic area." The concept embodies a number of interrelated components, including economic base, ethnic composition, govermental boundaries, community size, transportation and communication links, and lifestyle. The reapportionment process requires a balancing of these components; one may be deemed predominant while another may be subordinated. As well, the socio-economic factors may be subordinated to the consideration of population equality with another district. The balance is to be struck by the Governor and will be sustained unless it lacks any

rational basis. Groh v. Egan at 866.

Socio-eonomic integration does not require that regular social and economic interactions or transactions occur between the communities of the district, although such occurrences are indicia of socio-economic integration. Integration of interests was the basis of the North Slope - Kotzebue District, and the Yukon River District, both drawn by the Alaska Supreme Court in Egan v. Hammond, 502 P.2d at 586. There was, in those districts, no integration of social or economic systems across those vast areas.

The inclusion of Cordova in a district with small Inside Passage communities with identity or similarity of interests in fishing, forest management, ferry service, air service, and other

isssues does not violate the constitutional requirement of socio-economic integration.

Conclusion

Accordingly, based upon the findings of fact and conclusions of law set forth above, the court herein enters a final judgment of dismissal with prejudice in favor of the defendant and against the plaintiff on all claims alleged in the complaint, except as to the adjustment of the boundary lines for District 25 and 26 which the defendant is ordered to correct within 30 days from the date of this decision.

The court finds that the defendant was the prevailing party in this lawsuit. Nonetheless, the plaintiff commenced this action in the public interest, and, therefore should not be assessed any

costs or attorney's fees. Anchorage v. McCabe, 568 P.2d 986 (Alaska 1977). Each party shall bear their own costs and attorney's fees.

There is no just reason for delay in waiting for the defendant to adjust the boundary lines between District 25 and 26 as ordered above, and the court herein expressly directs that judgment be entered this date.

Judgment is hereby entered this 26th day of March, 1982.

David A. Moore, Jr.
Superior Court Judge

APPENDIX C

NOTICE OF APPEAL FILED WITH THE
ALASKA SUPREME COURT
ON AUGUST 26, 1982

THE SUPREME COURT OF THE STATE OF ALASKA

MARILYN CARPENTER,	)	
	)	
Appellant,	)	
	)	
vs.	)	File No. 6728
	)	
JAY S. HAMMOND, Governor of the State of Alaska,	)	
	)	
Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Marilyn Carpenter appeals to the Supreme Court of the United States from the final judgment on federal questions of the Alaska Supreme Court entered in this action on June 1, 1982 affirming the judgment of the Superior Court, Third Judicial District.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Date: August 26, 1982.

Holli Ilene Ploog

APPENDIX D

PROCLAMATION OF REAPPORTIONMENT AND REDISTRICTING

State of Alaska
Executive Proclamation
Of Reapportionment and Redistricting

WHEREAS, Article VI, Section 3 of the Constitution of the State of Alaska requires the Governor to reapportion the House of Representatives immediately following the official reporting of each decennial census of the United States; and

WHEREAS, the Supreme Court of the United States has determined that both houses of the state legislature must be apportioned on the basis of equal population; and

WHEREAS, the Supreme Court of the State of Alaska has determined that the Constitution of the State of Alaska requires the Governor to reapportion the

Senate as well as the House of Representatives, and

WHEREAS, I, Jay S. Hammond, Governor of the State of Alaska, in accordance with Article VI, Section 8 of the Constitution of the State of Alaska, appointed a Reapportionment Board and directed that they prepare an advisory plan to submit to me no later than 90 days following receipt of an official census data; and

WHEREAS, I directed that the Reapportionment Board prepare a plan that would meet the requirements of the United States Supreme Court and the Alaska Supreme Court decisions on reapportionment and those provisions of the Constitution of the State of Alaska that are not in conflict with those decisions; and

WHEREAS, the Reapportionment Board convened pursuant to my order, and after conducting public hearings in 20 communities throughout the state, releasing several draft versions of the reapportionment plan for public comment, and reviewing and revising their recommendations subsequent to receipt of public testimony, submitted their recommendations for reapportionment and redistricting to me on June 9, 1981, and

WHEREAS, Article VI, Section 10 of the Constitution of the State of Alaska requires the Governor to issue a proclamation of reapportionment and redistricting within 90 days from receipt of the recommendations of the Reapportionment Board;

NOW, THEREFORE, I JAY S. HAMMOND, Governor of the State of Alaska, hereby proclaim:

First, the recommendations of the Reapportionment Board for reapportionment and redistricting of the House of Representatives are accepted;

Second, the recommendations of the Reapportionment Board for reapportionment and redistricting for the Senate are accepted with the exception of the recommendations for truncation and length of terms as explained in the accompanying statement;

Third, the terms of all members of the Twelfth State Legislature shall terminate on the third Monday of January, 1983, except those senators elected in 1980 who constituencies have not changed as a result of this reapportionment by more than 40 percent;

Fourth, this reapportionment and redistricting shall be effective for election of members of the Legislature until the next decennial census;

Fifth, this reapportionment and redistricting shall be implemented for the 1982 primary and general elections;

Sixth, in the 1982 general election, 40 members shall be elected to the House of Representatives, and 18 members to the Senate;

Seventh, members of the House of Repreentatives shall be elected in 1982 from the following House Districts;

HOUSE DISTRICT	NAME OF DISTRICT	NUMBER OF REPRESENTATIVES
1	Ketchikan-Wrangell-Petersburg	2 (A-B)
2	Inside Passage-Cordova	1
3	Baranof-Chichagof	1
4	Juneau	2 (A-B)
5	Kenai-Cook Inlet	2 (A-B)
6	North Kenai-South Coast	1
7	South Anchorage	1
8	Hillside	2 (A-B)
9	Sand Lake	2 (A-B)
10	Mid-Town	2 (A-B)
11	West Side	2 (A-B)
12	Downtown	2 (A-B)
13	Mountain View-University	2 (A-B)
14	Muldoon	2 (A-B)
15	Chugiak-Eagle River-Bases	2 (A-B)

16	Matanuska-Susitna	2 (A-B)
17	Interior Highways	1
18	Southeast North Star Borough	1
19	Outer Fairbanks	1
20	Fairbanks City	2 (A-B)
21	West Fairbanks	1
22	North Slope-Kotzebue	1
23	Norton Sound	1
24	Interior Rivers	1
25	Lower Kuskokwim	1
26	Bristol Bay-Aleutian Islands	1
27	Kodiak-East Alaska Peninsula	1

Eighth, members of the Senate shall be elected in 1982 from the following Senate Districts except those seats where an asterisk (*) indicates the existing senator's term will continue until January 1985;

SENATE DISTRICT	COMPOSED OF HOUSE DISTRICTS	LENGTH OF TERM
A	Ketchikan-Wrangell-Petersburg	4 years

B	Inside Passage-Cordova Baranof-Chichagof	2 years *
C	Juneau	4 years
D	Kenai-Cook Inlet-North Kenai-South Coast-South Anchor.	Seat A-2 years Seat B-4 years
E	Hillside-Sand Lake	Seat A-2 years Seat B-4 years
F	Mid-Town-West Side	Seat A-2 years Seat B-4 years
G	Downtown-Mountain View-University	Seat A-2 years Seat B-4 years
H	Muldoon-Chugiak-Eagle River-Bases	Seat A-2 years Seat B-4 years
I	Matanuska-Susitna	2 years *
J	Interior Highways-Southeast-North Star Borough	2 years
K	Outer Fairbanks-Fairbanks City-West Fairbanks	Seat A-2 years Seat B-4 years
L	North Slope-Kotzebue Norton Sound	4 years
M	Interior Rivers-Lower Kuskokwim	4 years
N	Bristol Bay-Aleutian Islands-Kodiak-East Alaska Peninsula	2 years

Ninth, in all two-member house and senate districts candidates will run for designated seats indicated by Seat A and Seat B. Candidates will file for one of the available seats. Each qualified voter in the district may cast one vote for their choice among the candidates for each seat. The candidate receiving the greatest number of votes cast for each seat is elected.

IN WITNESS WHEREOF I have set my hand and caused the seal of the State of Alaska to be affixed, this _____ day of _____, 1981.

_____
JAY S. HAMMOND
GOVERNOR
STATE OF ALASKA

Attest:

_____
TERRY MILLER
LIEUTENANT GOVERNOR
STATE OF ALASKA

APPENDIX E

REPORT OF ADVISORY REAPPORTIONMENT BOARD (Pages 9-11)

The only segment of the population thought to contain large and readily identifiable concentrations of non-residents in military personnel and their dependents. Historically, this group has been concentrated in great numbers in a handful of communities. Their residency factor has been thought to be very low.

The Alaska Supreme Court has approved the principle that non-resident military personnel may constitutionally be excluded from the reapportionment population base:

> (W)hile the clause of the Alaska Constitution seeking to exclude military as a class is unconstitutional, that is not to say that

> some military cannot be excluded as a permissible device for limiting the impact of transients and non-residents on legislative districting.

Egan V. Hammond, 502 P. 2d 586, 869 (AK 1972). More to the point, the court observed:

> We hold that it was reasonable for the Board to exclude some proportion of military personnel not merely because of their transcience, but because a significant number of Alaska-based military personnel exercise an option to be non-Alaskans, despite their physical presence here. This phenomenon is well demonstrated by the minuscule voter registration on military enclaves. It is thus not offensive to notions of equal protections to exclude from the population base even military personnel who have lived in Alaska for substantial periods of time, so long as those people have exercised their option to remain residents and domiciliaries of other states.

ID. at 872-873.

Dr. Kruse determined that there are seven military installations with populations large enough to affect the reapportionment process. These installations

are Elmendorf Air Force Base, Eielson Air Force Base, Fort Wainwright, Fort Richardson, Fort Greely, Adak Naval Base, and the Kodiak Coast Guard Station.

Because Military records are not updated consistently, they are deemed unreliable. A full census of military personnel and their dependents was rejected both because of cost and becuase more reliable results can actually be obtained from a survey of scientific sample. Thus, it was decided to proceed with a survey of military personnel and dependents, both on- or off-base.

The survey sought to answer two questions: First, did the respondent consider Alaska to be his or her home; second, was the respondent registered to vote in Alaska. If the answer to <u>either</u> of these inquiries was "yes", the respondent was deemed to be a resident;[1] put

another way, a person was not deemed to be a non-resident unless he or she neither voted nor considered Alaska home.

The survey sought to answer two questions: First, did the respondent consider Alaska to be his or her home; second, was the respondent registered to vote in Alaska. If the answer to <u>either</u> of these inquiries was "yes", the respondent was deemed to be a resident;[1] put another way, a person was not deemed to be a non-resident unless he or she neither voted nor considered Alaska home.

Separate non-residency factors were obtained for on-base service members, on-base dependents, off-base service members and off-base dependents. The off-base results were achieved by use of address lists provided by the military branches which allowed Dr. Kruse to determine, with precision, how many service members

and dependents live in each off-base enumeration district near a given installation. (Original footnotes omitted.)

1 This statement is incorrect. According to the study which actually determined citizenship, the military had to not only consider Alaska to be their home, but also had to plan to make Alaska their home when they left the military.

"All military personnel who reported that they had registered to vote in the State of Alaska are treated as Alaska residents. In addition, all personnel who consider their home to be in Alaska and plan to make their home in Alaska when they leave the military are treated as Alaska residents, regardless of whether they have registered to vote in Alaska."

Kruse, Design and Implementation of Alaska 1980 Data Collection Effort, 1980 p. 42.

FILED
OCT 1 1982
CLERK

No. 82-370

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MARILYN CARPENTER,
Appellant,

vs.

JAY S. HAMMOND, GOVERNOR OF ALASKA,
Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION OF JAY S. HAMMOND, GOVERNOR OF ALASKA TO DISMISS OR AFFIRM

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OCTOBER TERM, 1982

MARILYN CARPENTER,
Appellant,

vs.

JAY S. HAMMOND, GOVERNOR OF ALASKA,
Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION OF JAY S. HAMMOND, GOVERNOR OF ALASKA TO DISMISS OR AFFIRM

Appellee Jay S. Hammond, Governor of Alaska, moves this Honorable Court, pursuant to Rule 16.1(a), Rule 16.1(b) and Rule 16.1(d) of the Rules of the Supreme Court of the United States, to dismiss the above-captioned appeal of appellant Marilyn Carpenter because the appeal is not taken from a final judgment of the Supreme Court of the State of Alaska, because the third question presented was never "drawn in question" in the state courts, because appellant has conceded that she has failed to allege and prove her standing to pursue the appeal, and because the appeal does not present a substantial federal question; or, alternatively, to affirm the judgment of the Supreme Court

of the State of Alaska. Should the jurisdictional statement of the appellant be treated as a petition for certiorari, the Governor respectfully requests that the petition be denied for the reasons set out in this motion.

I

INTRODUCTION

This appeal concerns Alaska Governor Jay Hammond's 1981 reapportionment of the Alaska Legislature. Appellant's claim is that it was improper to base the reapportionment on a population count which excluded those military personnel and military dependents who neither considered Alaska their home nor registered to vote in Alaska.

The treatment of servicemembers and their dependents in the reapportionment process is best understood when viewed together with the treatment of other groups in Alaska thought to contain large numbers of nonresidents. The Governor's nonpartisan Reapportionment Board, appointed pursuant to Alaska Constitution, article VI, section 8, knew in advance that the United States Bureau of the Census would count many persons who did not consider themselves to be residents or domiciliaries of Alaska. For this reason, the board decided to secure the services of an expert to advise it on the treatment of groups in Alaska thought to contain large numbers of nonresidents, including military personnel and their dependents, oil production base camp workers, seasonal lumber camp workers, seasonal workers at fish processing facilities, students, felons, and aliens. Professor John A. Kruse of the Institute of Social and Economic Research of the University of Alaska, an expert in Alaska demography and survey research, was retained for this purpose.

Professor Kruse determined that students, aliens, felons and oil production base camp workers would not skew any apportionment scheme.[1] The board and the Governor, therefore, chose not to exclude any of their numbers from the reapportionment population base. No issue was made of this decision at trial or on appeal to the Alaska Supreme Court. However, fish processing workers, lumber workers, and military personnel and their dependents presented closer questions.

Professor Kruse expected that the census bureau would significantly undercount fish processing workers in Bristol Bay and the Aleutian Islands. Such counts of workers are usually inaccurate when the counters are disorganized, when the workers and their supervisors are hostile, when the workers are spread among many locations, when the locations are remote and mobile (as were many fish processing ships), and when the counters are so poorly paid that they have no incentive to overcome these difficulties. All these problems plagued the census in southwestern Alaska. Because of the likely and significant undercount, any attempt to exclude nonresident employees would likely have resulted in a double elimination, taking out of the population base persons who were never included in the first place. Finally, workers who identified to the census bureau a different place as a home address were allocated to that other place by the census bureau. *See* Jurisdictional Statement, Appendix B-11 through B-16.

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[1]The reasons varied: most college students were found to be Alaska residents; aliens were relatively few in number, spread across many districts and very difficult to locate; felons were few in number; and oil base camp workers were counted by the census bureau at their true homes rather than their work camps.

A special census report on fish processor housing released four months after the Governor promulgated his plan vindicated Professor Kruse's judgment concerning the likely undercount of fish processing workers. Whereas the fish processing employers reported that their work force numbered approximately 2,500, the census bureau counted only 760 persons. The remaining 1,700 were either missed by the census bureau or reallocated to their true homes on the basis of their responses to the home address question. There was, as well, no way to determine the residency characteristics of the 760. Indeed, it was likely that most of the nonresidents who were thought to be present among the 2,500 were missed or reallocated, leaving residents highly concentrated in the 760. There was, therefore, no reliable or legal basis for excluding any fish processing workers. Jurisdictional Statement, Appendix B-16.

Lumber workers presented the census bureau and Professor Kruse with essentially the same problems as fish processing workers. There was an undercount of an already very small population (630 potential nonresidents *state wide*), and those nonresidents that were found by the census bureau were reallocated to their true homes. Jurisdictional Statement, Appendix B-16 through B-17.

The board's and the Governor's treatment of military personnel and their dependents was summarized in the board's report (footnotes omitted):

> The only segment of the population thought to contain large and readily-identifiable concentrations of non-residents is military personnel and their dependents. Historically, this group has been concentrated

in great numbers in a handful of communities. Their residency factor has been thought to be very low.[2]

Dr. Kruse determined that there are seven military installations with populations large enough to affect the reapportionment process. These installations are Elmendorf Air Force Base, Eielson Air Force Base, Fort Wainwright, Fort Richardson, Fort Greely, Adak Naval Base, and the Kodiak Coast Guard Station.

Because military records are not updated consistently, they were deemed unreliable. A full census of military personnel and their dependents was rejected both because of cost and because more reliable results can actually be obtained from a survey of a scientific sample. Thus, it was decided to proceed with a survey of military personnel and dependents, both on- and off-base.[3]

The survey sought to answer two questions: First, did the respondent consider Alaska to be his or her home; second, was the respondent registered to vote in Alaska. If the answer to *either* of these inquiries was "yes," the respondent was deemed to be a resident; put another way, a person was not deemed to be a nonresident unless he or she neither voted nor considered Alaska home.

Separate nonresidency factors were obtained for on-base servicemembers, on-base dependents, off-base servicemembers and off-base dependents. The off-base results were achieved by use of address lists provided by the military branches which allowed Dr. Kruse to de-

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[2] In 1972, the board found only eleven percent of active duty personnel to be residents. Groh v. Egan, 526 P.2d 863, 874 (Alaska 1974). In 1980, military records revealed that three to six percent of servicemembers in Alaska claimed Alaska as their residence.

[3] The survey form, with Governor Hammond's introductory letter, is reprinted *infra* as Appendix I.

termine with precision, how many servicemembers and dependents live in each off-base enumeration district[*] near a given installation.

The results ranged from a low of seven percent residents among active duty personnel at Adak Naval Station to a high of sixty-four percent residents among Eielson Air Force Base dependents living off-base. The appropriate factor was applied to each military and dependent group at the enumeration district level, and the population of each enumeration district was reduced accordingly.

II

ARGUMENT

A. There has been No Final Judgment by the Alaska Supreme Court; Jurisdiction is Therefore Lacking

The Alaska Supreme Court has never entered a judgment on any issue in this case. That part of the order which is said to be the jurisdictional basis for this appeal is nine words long: "Otherwise, the judgment of the superior court is affirmed." The court then declared that an opinion will follow. Jurisdictional Statement, Appendix A. There is subsumed in those nine words eleven points on appeal and fifty pages of arguments on the military survey issues alone. Six of the points on appeal are factual issues which, as primarily state law questions, will be finally determined by the Alaska Supreme Court when it issues its opinion.

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[*] An enumeration district is one of the smallest geographic areas forming the building blocks of the census. In the 1980 census, there were approximately 1,100 enumeration districts in Alaska.

The factual issues yet to be decided by the state court are critical to the resolution of this appeal. The trial court's factual findings with respect to servicemembers and other groups in Alaska, if affirmed by the Alaska Supreme Court, seriously undermine the factual basis for appellant's legal arguments.[5] The answer to the legal issues would be determined, in large part, by facts in the record, and the Alaska Supreme Court's confirmation of the factual findings would likely be deemed conclusive in this Court. *Eau Claire National Bank v. Jackman,* 204 U.S. 522, 537 (1907).

There is totally absent from the order appealed from any resolution of key factual disputes and any statement of a *ratio decidendi.* For these reasons, the order should not be deemed a final judgment.

In short, this appeal is premature.

B. Appellant Concedes that She has Failed to Allege Standing

The appellant is neither a servicemember nor a dependent. So far as the record shows, she has never been in the military and has no connection with the military. Appellant has not alleged that a single servicemember or dependent

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[5]The challenged findings that civilians vote at a rate 5.6 times higher than servicemembers, that there is an established pattern of military non-participation in the political life of Alaskan communities, and that fish processing and lumber workers could not feasibly be surveyed and excluded from the reapportionment population, are central to the Governor's thesis that he acted reasonably and constitutionally in surveying and excluding a portion of the servicemember population and not other groups.

lives in her district; indeed, she has omitted entirely to plead or prove her election district.[6]

Appellant called no servicemembers or dependents to testify; to our knowledge none has complained of the Governor's survey in a judicial or any other forum. The only expert witnesses on the military in Alaska were the Governor's own, one of whom was called by the appellant in her case in chief. Appellant called only one other witness on these issues.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), this Court described the standing analysis:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). *See also*

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[6]The Governor moved to dismiss both the complaint and the appeal for lack of standing, but appellant was held to have "voter standing" under Alaska Constitution, article VI, section 11. In her jurisdictional statement, appellant claims to have standing by reason of residence in a certain election district containing a certain number of servicemembers. However, those items are not in the record: they only appeared in an "amended complaint" offered for the first time in this Court, and which the clerk refused to file.

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

Id. at 72.

This appeal presents no concrete controversy in a fully-developed factual context: The pleadings and record do not reveal where appellant resides. From the pleadings, we do not know whether even one servicemember resides in her district. Having failed to plead residence in a specific district with military residents, no evidence was adduced to show that military residents, though excluded from the reapportionment population base, actually vote and thereby dilute the weight of appellant's vote. Not a single member of the allegedly injured class, servicemembers, claims any injury at all.

A number of federal and state courts have ruled on the the propriety of legal challenges to legislative apportionment plans by persons not in the injured class or the underrepresented district. They have held uniformly that such persons lack standing to sue. *Fairley v. Patterson*, 493 F.2d 598, 603-604 (5th Cir. 1974; *Shapiro v. State of Maryland*, 336 F. Supp. 1205, 1208-1209 (D. Md. 1972); *Vigneault v. Secretary of the Commonwealth*, 237 N.E.2d 286, 287 (Mass. 1968); *McGlue v. Essex County Commissioners*, 113 N.E. 742, 743-744 (Mass. 1916).

C. The Third Question Presented by Appellant was not Raised or Decided in the State Courts; It Cannot be Raised for the First Time in this Court

The third question presented in appellant's jurisdictional statement was not raised in the Alaska Supreme Court[7] or in the trial court.[8] As such, the issue was not "drawn in question," *see* 28 U.S.C. § 1257(2), and cannot be considered by this Court. *E.g., Cardinale v. Louisiana,* 394 U.S. 437, 438-439 (1969).

D. The Questions Presented are Not Substantial; The Military Survey was a Constitutional Device to Measure Nonresidency and Minimize Dilution of Voting Strength Caused by Inclusion of Nonresidents

The decision of the board and the Governor to exclude nonresidents from the reapportionment population base was premised on the seminal pronouncement of this Court in *Reynolds v. Sims,* 377 U.S. 533 (1964):

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as

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[7]Appendix II, *infra,* a copy of appellant's description of the issues presented to the Alaska Supreme Court, makes no mention of the issue. Such an omission from the "assignments of error" in state court has been deemed significant by this Court in deciding to refuse review. Beck v. Washington, 369 U.S. 541, 553 (1962). It is the rule in Alaska that matters set out in the points on appeal but not briefed are waived, and matters briefed but not set out in the points on appeal are also waived. Wetzler v. Wetzler, 570 P.2d 741, 742, note 2 (Alaska 1977). *See* State v. Wassilie, 606 P.2d 1279, 1281, n. 7 (Alaska 1980). Rule 210(e), Alaska Rules of Appellate Procedure, provides, in part, that the supreme court will consider only the points included in the statement of points on appeal.

[8]*See* Jurisdictional Statement, Appendix B-11 through B-25.

> effectively as by wholly prohibiting the free exercise of the franchise.

Id. at 555.

It is self-evident that a resident, in a district with many nonresidents who take no interest in state and local political affairs, who do not vote, and who retain domiciles elsewhere, has considerably more influence on the legislative process than a resident in a "solid" district who must compete with many more actual voters and constituents to elect and influence a legislator. The latter resident's vote and influence is effectively debased and diluted. To alleviate this effect, it was decided to subtract from the census counts those numbers of identifiable nonresidents whose inclusion would otherwise distort the political influence of residents.

Neither the appellant nor anyone else objected to the board's and the Governor's decision to leave college students, aliens, felons and oil production base camp workers in the reapportionment population base. The reasons are briefly set out in n. 1, *supra*.

The only nonresident groups that could have impacted apportionment by diluting or inflating others' political influence were those groups that were both large and unevenly distributed across the state.[9] The only such groups were seasonal fish processing workers, seasonal lumber camp workers, and military personnel and their dependents.

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[9]Even a very numerous class will not skew apportionment if its members are widely dispersed across the election districts. For example, in Alaska, there may be thousands of transient construction workers. But because they are evenly distributed, their inclusion will not distort legislative representation: the election district boundaries will remain the same and the districts will remain equipopulous whether they are included or excluded.

No exclusion of fish processing and lumber workers was possible because any study of those workers would have been unreliable,[10] and because an exclusion would have worked a double elimination by removing from the population base persons never counted by the census bureau. Jurisdictional Statement, Appendix B-15.

Only military personnel and their dependents were counted in the census in Alaska, were identifiable, *and* were distributed in such a way and in such numbers as to impact apportionment. For these reasons, the board and the Governor commissioned a voluntary survey of several thousands of randomly-selected servicemembers to determine how many were Alaska residents and how many were registered to vote in Alaska. Residence was presumed; a servicemember was deemed a nonresident only if he or she neither registered to vote in Alaska nor considered Alaska home.

This Court has confirmed the right of states to treat nonresidents differently for voting and representation purposes. The clearest statement is found in *Burns v. Richardson*, 384 U.S. 73 (1966). In that case Hawaii had formulated a reapportionment plan based exclusively on the registered voter population. Many military personnel were thereby excluded from the population of certain districts because many were not registered voters. This Court found that using the registered voter population as a basis was, under the circumstances of the case, acceptable because there was no showing that it excluded persons in the com-

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[10]The reasons supporting this conclusion are set out in detail in the Jurisdictional Statement, Appendix B-12 through B-17.

plainant's class who would not be excluded under some other acceptable population enumeration.

On the central question of the propriety of any exclusion of portions of the population, this Court observed:

> We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. . . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of a crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.[21] The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

Id. at 91-92. Footnote 21 to the text reads, in pertinent part, as follows:

> Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. *See also* Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775. Where the exclusion is of those not meeting a State's residence requirements, however, different principles apply. The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification.

This Court then referred with apparent approval to the use of state "citizen" population as a basis for reapportionment. *Id.* at 93-95.

In *Carrington v. Rash*, 380 U.S. 89 (1965), this Court faced the different legal question of the right of military personnel to vote (as distinguished from their right to be counted for reapportionment purposes). This Court struck down a law which forbade active duty military personnel to vote in Texas elections unless they were Texas residents before enlistment, but in so doing, an important distinction was underscored:

> We stress—and this a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents *with the intention of making Texas their home indefinitely*, they, as all other qualified residents, have a right to an equal opportunity for political representation.

Id. at 93-94 (emphasis added).

The Alaska Supreme Court has addressed the question of the military in reapportionment in two of its opinions. In *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972), the court identified the problem:

> We recognize that the substantial military population present in the state because of military orders and without intention to make Alaska their home can easily give an unbalanced representation to areas abutting their bases.

Id. at 870. The phenomenon is well-known in history as "rotten boroughs." *See generally Baker v. Carr*, 369 U.S. 186, 302-307 (1962) (Frankfurter, J., dissenting). The court went on to declare that "plans based on accurate data of

state citizenship or state residency could meet the standards of the federal equal protection clause." *Id.* at 870 (emphasis added).

In *Groh v. Egan*, 526 P.2d 863 (Alaska 1974), the Alaska court reaffirmed its observations in *Egan v. Hammond* about treatment of military. In so doing, two criteria were crystallized:

> It is thus not offensive to notions of equal protection to exclude from the population base even military personnel who have lived in Alaska for substantial periods of time, *so long as those people have exercised their option to remain residents and domiciliaries of other states.*

Groh v. Egan at 873 (emphasis added). On the same page, at n. 36, it was found

> There is every reason to believe that military personnel who desire to be Alaska residents and domiciliaries will register to vote because *voter registration is a prime index of intention to become a resident or domiciliary.* For like reason, we think that *those who do not want to become Alaskans demonstrate that intention by refusing to register to vote.*

Id. (emphasis added).[11]

As Justice Boocheever stated on behalf of the court:

> We hold that it was reasonable for the Board to exclude some proportion of military personnel not merely because of their transience, but because a significant number of Alaska-based military personnel

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[11]Justice Boocheever's statement is in accord with this Court's expressions in *Burns* concerning a registered voter population base. For in *Groh*, voter registration was *a* factor, not the only factor; the measure was not registered voters but a ratio of population and registered voters in both civilian and military districts.

> exercise an option to be non-Alaskans, despite their physical presence here.

Id. at 872.[12]

Appellant's attack on the military survey is premised on a misunderstanding of the record. She asserts in her jurisdictional statement that servicemembers were excluded if they did not "intend to remain a resident indefinitely. Anyone who intends to leave the state at some point in the future and not return is ineligible for state citizenship." Jurisdictional Statement at 15. This is simply wrong. The actual questions on the military survey imposed no durational requirement:

1. Do you consider your home to be in Alaska or some other state?

2. Do you plan to make your home in Alaska or some other state when you leave the military?

See Appendix I. Furthermore, servicemembers who were registered to vote were deemed residents regardless of their responses to the questions.

The terms of the second question ("when you leave the military") address one key, distinguishing fact for military personnel: they are in Alaska not by choice but as a result

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[12]It is the Governor's view that such an exclusion may be *required* by the United States Constitution and the Voting Rights Act of 1965, 42 U.S.C. § 1973. Insofar as the political strength of persons in districts without nonresident military would be diluted as compared with the political strength of persons in districts with nonresident military, equal protection of the laws may be denied. And if the disparity were to exist as between military districts and predominantly Native districts, § 1973 would be implicated.

of legal compulsion.[13] Thus, it is extremely difficult for them to acquire a domicile of choice unless they are relieved of the legal threat by retirement or discharge. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17.

Appellant places principal reliance on three cases. The distinguishing features of two, and the unsoundness of the third, are patent. Both *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972), and *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972), involved plaintiffs who had come voluntarily to their respective college communities and who had demonstrated their interest in the political life of their communities by attempting to register to vote. What the courts found objectionable was an essentially irrebuttable presumption that one was not qualified to vote unless one had the intention to remain in the state permanently or indefinitely. The Governor agrees that the standard is objectionable.

We quote from *Ramey* at length:

> Thus, we think that the only constitutionally permissible test is one which focuses on the individual's present intention and does not require him to *pledge allegiance for an indefinite future.* The objective is to determine the place which is the center of the individual's life now, the locus of his primary concern. The determination must be based on *all* [emphasis in original] relevant factors; it is not enough that a student, or any other former non-domiciliary, would find that the place of his presence is more convenient for voting

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[13] At the same time, it should be noted that not one servicemember or dependent was excluded on the basis of their presence under legal compulsion; that was only a factor identifying them as potential nonresidents. They were excluded only if they neither voted nor considered Alaska home.

> or would enable him to take a more active part in political life. *The state may insist on other indicia, including the important one of abandonment of a former home.*
>
> We think therefore that, in determining bona fide residence for a person physically present, the state cannot constitutionally go further than the test set out in the Restatement (Second) of the Conflict of Laws § 18 (1971), namely, that he "must intend to make that place his home for the time at least." Important points for consideration are that "The search in each instance is for the state to which the person is most closely related at the time;" and that a person can have the proper attitude to acquire a domicile even if he intends to move at a fixed time in the future; but that on the other hand, *"The required attitude of mind involves to a certain extent the idea of fixity;" and that a person does not have a domicile at a place if he has the intent to return to another that had been his home.*

Id. at 788-789 (emphasis added except as noted; footnote omitted).

In context, and with close attention to the text, comments and illustrations of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), even the court's references to "present intention," and intent to make the state "his home for the time at least," *id.* at 788, are readily seen to be consistent with the questions asked in the military survey in this case.

Section 17 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) provides that "A person does not acquire a domicil of choice by his presence in a place under physical or legal compulsion." Comments to and illustrations of the section are instructive:

> *Soldiers and sailors.* A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, will probably not acquire a domicil there though he lives in the assigned quarters with his family. He must obey orders and cannot choose to go elsewhere. On the other hand, if he is allowed to live with his family where he pleases, provided it is near enough to his post to enable him to perform his duties, he retains some power of choice over the place of his abode and may acquire a domicil. To do so, however, *he must regard the place where he lives as his home.* Such an attitude on his part may be difficult to establish in view of the nomadic character of military life and particularly *if he intends, upon termination of his service, to move to some other place.*

Id., Comment d (emphasis added).

> A's domicil is in state X. As an officer in the Army, A is required to live on an Army post in state Y. His wife resides there with him. A is still domiciled in X.

Id., Illustration 1.

> A's domicil is in State X. A is appointed a member of the Cabinet. A purchases a house in Washington, D.C., and lives there with his family. A person in A's position will usually not intend to make his home in Washington, D.C. In the absence of facts showing *an intention to remain in the District of Columbia after his tour of duty,* A will probably be found to have retained his domicil in X.

Id., Illustration 7 (emphasis added).

Section 18 of the RESTATEMENT (SECOND) provides that "To acquire a domicil of choice in a place, a person must intend to make that place his home for the time at least." Comment (b) is instructive:

> An intention to make a place one's home for a limited time may not effect a change of domicil when there is a *present intention to return to the previous home.* The required attitude of mind involves to a certain extent the idea of fixity. It is essential that the person intends to remain in the place for *a* time at least. If he intends to remain there permanently, it is easier to find the required attitude of mind than if he intends to move away at some time in the future. If he does not intend to move at a definite time, it is easier to find that he has this attitude of mind than if he intends to move at a definite time.[14] It is possible, however, for a person to have the proper attitude of mind even though he does intend to move at a definite time; although the more distant that time is, the easier it is to find the requirement satisfied.
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> Other factors to be considered include the person's feelings toward the place. It is not essential that the place be the one where he would prefer to live or to which he is sentimentally most attached. But if the place does occupy such a position in his affections it is easier to find the requirements of this Section satisfied than if it does not. Similarly, it is easier to find the existence of the requisite intention if the person has abandoned his former place of domicil than if he retains important ties with it (see Special Note following § 20). The search in each instance is for the state to which the person is most closely related at the time.

Id. (emphasis added).

Section 19 of the RESTATEMENT (SECOND) declares that "A domicil once established continues until it is superseded by a new domicil." Two illustrations bear on the case at bar:

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[14]In Alaska, servicemembers serve fixed tours of duty of three years duration.

1. A, having a domicil in state X, ceases to live there. A does not acquire another home. A's domicil is in X.

2. A, having a domicil in state X, goes to live in state Y. A has not yet decided to make his home in Y. A's domicil is in X.

Thus, a declaration that the constitutional test is one of "*present* intention" is easily misunderstood when taken out of its context in the RESTATEMENT (SECOND). The term itself is something of a contradiction in terms: "intention" is, by definition, a reference to the future. "Present intention," in the *Ramey* court's use, must be read to mean "the plan for the future which one holds to today."

Neither can it be forgotten that the *Ramey* court embraced one requirement that was central to the military survey in the case at bar: the requirement that a person abandon a former home and any intention to return to that place as a home. *Id.* at 788.

What distinguishes the case at bar from *Newburger* and *Ramey* are five facts. First, the class of persons here came to Alaska under legal compulsion. Jurisdictional Statement, Appendix B-19.

Second, whereas plaintiffs in *Newburger* and *Ramey* declared in unequivocal terms their interest in the political life of their college communities, the class here has just as unequivocally stated the opposite by declaring *both* that Alaska is not their home and that they do not wish to vote here.[15]

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[15]Alaska Director of Elections Patty Ann Polley testified that civilians and their dependents vote at a rate 5.6 times higher than military personnel and their dependents (45% vs. 8%). But political inactivity is not the only factor which sets military apart from

Third, had there been a presumption of nonresidence, members of the class here could individually have rebutted it by a simple, anonymous declaration of either an Alaskan home or Alaska voter registration. It is noteworthy that, in the introductory letter which was attached to each survey and is set out in Appendix I, the Governor assured respondents that their responses would be confidential, would not affect their taxes, their hunting or fishing privileges, their right to vote or any other right under Alaska law, and that they could change their home no matter how they responded to the questionnaire.

Fourth, unlike the *Newburger* and *Ramey* situations, respondents to the military survey were not required to pledge to remain in Alaska for *any* period of time. They could formulate a new intent the next day.

Fifth, whereas the objectionable criterion in *Newburger* and *Ramey* (intent to remain permanently) depressed voter registration, the criterion to which appellant objects (question 2, intent to make one's home in Alaska upon discharge) actually received the *highest* "Alaska" response rate. Question 1 yielded a residency rate of twenty-seven percent; question 2 yielded a residency rate of thirty-one percent.

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civilians. Brigadier General William J. Sharrow offered an extensive litany of facilities and services available on-base and on-post which were the bases for Judge Moore's factual finding that the Alaska installations are self-contained and insular. Professor Kruse testified that 72 percent of school-age dependents are in grades 1-6, and General Sharrow noted that they attend schools on-base or on-post. Because military families contain a disproportionate number of preschool age children, the 72 percent figure is a substantial underestimate of the proportion of all military children who need not leave the base or post to attend school.

The third case upon which appellant relies is *Marks v. Township Committee of New Hanover*, 308 A.2d 24 (N.J. App. 1973). The Governor believes that no more need be said than that, on the point for which appellant cites the case, the *Marks* court could cite only contrary authority. *Id.* at 26, n.3. Since 1973, *Marks* has never been cited for any proposition in any reported decision.

Finally, appellant objects that some persons were included as residents by reason of voter registration while others, not registered, were included or excluded on the basis of a "more restrictive" intent standard of residency. Her argument runs counter to her entire theory of the case, namely, that the survey had the invidious design to, in the words of appellant's complaint, "reduce the representation of the Anchorage and Fairbanks areas." Appellant pleaded no other harm.

If this Court concludes that the intent questions on the survey were constitutional devices to minimize the dilution of the voting strength of persons in districts with few or no military, appellant can hardly complain if military and their dependents who are registered to vote were automatically included. If the rest of the survey is constitutional, the fact that some military were *included* on a "less restrictive" standard has not harmed appellant; if there are military in her district, it has helped her.

There is no factual basis in the record for appellant's claim that, had this two part test been applied to civilians, many of their number would have been excluded as well.[18]

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[18]To the contrary, the record reflects that civilians vote at a much higher rate than military, and they are more likely to be Alaska residents because they came to Alaska voluntarily. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17.

Even if there were a factual basis, it would make no difference since those nonresident civilians would be evenly distributed across the state. *See* n. 9, *supra*.[17]

Viewed overall, appellant's claims are clearly not substantial. She has cited but one case supporting her contentions *(Marks)* and it is contrary to the settled law of domicile and the decisions of this Court.

The absence of conflict in the decisions also militates against review of this case. The leading cases on these issues are this Court's decisions in *Burns* and *Carrington* and the Alaska court's decision in *Groh*, and they squarely support the Governor in this appeal. Only the *Marks* decision by the New Jersey appellate court stands opposed, and its infirmity has already been noted.[18]

Another consideration, especially prominent in the certiorari cases, is the national importance and the recurrent nature of the problem presented. *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967); *Baggett v. Bullit*, 377 U.S. 360, 366 (1964). It cannot be gainsaid that voting and reapportionment are issues of the greatest import. But the

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[17]Appellant's arguments concerning the domicil of spouses and children are unmeritorious. The notion that a servicemember's spouse and children have a different domicil from the servicemember is strained. Unless we are to presume divorce and a termination of parental rights, the domicil of the spouse and children will be the same as that of the servicemember. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 21-22. In any event, the survey with respect to spouses, children and other dependents specifically inquired about those dependents; it was not assumed that they followed the residence of the servicemember, it was asked and proved.

[18]A conflict does not exist between decisions adjudicating different legal interests on different facts. *See* Keller v. Adams-Campbell Co., 264 U.S. 314, 319 (1924). Therefore, *Ramey* and *Newburger* provide no justification for this appeal.

treatment of military in the voter registration and reapportionment contexts is an issue which this Court settled sixteen years ago. It does not require this Court's review, especially when the servicemembers themselves have made no complaint.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), this Court dismissed a writ of certiorari because there were no "special and important reasons" for granting the writ as required by Supreme Court Rule 19 (now Rule 17). Mr. Justice Frankfurter's remarks for the Court are timely:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Id. at 74 (citations omitted). This case, like *Rice*, presents "rather unique circumstances," *id.*, which exclude it from the "special and important" category. The unusual questions attract attention; but only recurring or growing problems, national in scope, demand this Court's review.

Furthermore, appellant's contentions lack even the abstract appeal of the *Rice* issues since they have already been considered in *Burns* and *Carrington* and resolved adversely to appellant:

> In light of our previous decisions, the plaintiff has failed to raise a substantial federal question and the appeal is dismissed for want of jurisdiction.

Patterson v. Stanolind Co., 305 U.S. 376, 379 (1939).

This appeal, too, should be dismissed.

III

CONCLUSION

It is well-established in the decisions of this Court that persons who, though physically present in a state, do not consider it their home need not be admitted to the franchise or included in a reapportionment population base. The persons so excluded in this case not only did not consider Alaska home, they had no wish to vote. It was this situation, and the guidance of this Court, which caused the Alaska Supreme Court to approve the Governor's reapportionment plan. Plenary consideration by this Court can do no more justice.

The Governor respectfully requests that this Court dismiss this appeal because it is premature, because the appellant has no standing to appeal, and because the appeal presents no substantial federal question. In the alternative, the Governor requests that the decision of the Alaska Supreme Court be affirmed summarily.

Respectfully submitted,

WILSON L. CONDON
Attorney General
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COUNSEL OF RECORD
Assistant Attorney General
Counsel for Appellee

(Appendices follow)

Appendix I

Jay S. Hammond
Governor

[Letterhead]

State of Alaska
Office of the Governor
Juneau

May 23, 1980

Dear Servicemember:

I am required by the Constitution to adjust Alaska's legislative districts after the 1980 census to account for population shifts. For this reason, it is crucial that I know how many servicemembers consider Alaska to be their legal residence or home. To learn this, the following questionnaire is being sent to a randomly selected group of servicemembers.

Even though you are stationed in Alaska, your home may be in another state. If you intend to remain in or return to Alaska to live when your military service ends, then Alaska is your home; but if you intend to return to another state, your home is in that other state. Until you decide to change your home to a new place, it remains in that state in which you previously lived and considered home. You can have only one home at a time. You need not have a house, apartment or dwelling in a place to have your home there.

This survey is voluntary, but your cooperation counts. Your answers will be seen *only* by my staff and will not

affect your taxes, your hunting, trapping or fishing privileges, your right to vote or any other right under Alaska law. Finally, you can change your legal residence or home no matter what you answer on the questionnaire. Thank you for your help in this important undertaking.

Sincerely,

/s/ JAY S. HAMMOND
Jay S. Hammond
Governor

Please fill out the questionnaire, detach the self-addressed stamped post card and drop it in the mail.

INSTRUCTIONS: Please check the appropriate box for questions 1, 2, 3, & 7. Please put the appropriate number in the box for questions 4, 5 & 6.

For follow-up purposes only

1. Do you consider your home to be in Alaska or some other state?

1. Alaska	Some 2. Other State

2. Do you plan to make your home in Alaska or some other state when you leave the military?

1. Alaska	Some 2. Other State

3. Are you registered to vote in the State of Alaska?

1. Yes	2. No

4. How many dependents currently live with you (spouse, children)?

5. How many of these dependents consider their home to be in Alaska *and* intend to make their home in Alaska in the future?

6. How many of these dependents have registered to vote in the State of Alaska?

7. Do you live on the military installation itself?

1. Yes	2. No

Appendix II

Case No. 81-5839

In the Supreme Court for
the State of Alaska

Marilyn Carpenter,
Plaintiff-Appellant

vs.

Jay S. Hammond, Governor of Alaska,
Defendant-Appellee

On Appeal from a Judgment of the
State Superior Court for the
State of Alaska

Brief of Appellant

I. THE ISSUES PRESENTED

1. Whether it was constitutionally permissible to utilize a residency test which included the requirement of an intention to remain indefinitely in the state. (T.B. p.5)[1]

2. Whether the residency test applied only to military personnel and their dependents discriminates against military personnel and their dependents by subjecting them to a higher standard of citizenship than the rest of the population. (T.B. p. 10)

3. Whether the residency test established two different standards within the class of military personnel and their dependents in that some members of the class were held to

[1]T.B. indicates Trial Brief Case No. 81-5839

an indefinite intention test while others were classified as residents on the basis of less restrictive election code standards. (T.B. p. 12)

4. Whether the legal compulsion doctrine is relevant as a factor in the determination of military domicile for reapportionment purposes. (T.R. p. 917; F.J. p. 9)[2]

5. Whether the use of a future intent test while unconstitutional as applied to certain groups for voting purposes, is constitutionally permissible as applied to the military for reapportionment purposes. (T.B. p.8; F.J. p.9)

6. Whether the legal compulsion doctrine is constitutionally permissible as applied to military dependents for domicile purposes in reapportionment. (T.R. p. 917; F.J. p. 9)

7. Whether the inclusion of Cordova in House District 2 is constitutional and reasonable in light of Article VI, § 6 of the Alaska Constitution. (T.B. p. 15; F.J. p. 11)

8. Whether House District 2 is formed of contiguous and compact territory. (T.B. p. 13; F.J. p. 16)

9. Whether socio-economic integration requires social and economic interactions among the population of an election district. (T.B. p. 18; F.J. p. 17)

10. Whether House District 2 contains as nearly as practicable a relatively integrated socio-economic area. (T.B. p. 13; F.J. p. 17)

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[2]T.R. indicates Transcript case no. 81-5839; F. J. indicates Final Judgment case no. 81-5839.

Office - Supreme Court, U.S.
FILED
OCT 28 1982
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CLERK

No. 82-370

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARILYN CARPENTER
Appellant,

V.

JAY S. HAMMOND, GOVERNOR OF ALASKA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
FOR THE STATE OF ALASKA

APPELLANT'S MOTION IN OPPOSITION OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

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A. THE ORDER OF THE ALASKA SUPREME COURT IS A FINAL JUDGMENT: THIS COURT HAS JURISDICTION.

The order issued by the Alaska Supreme Court, with the exception of one state issue remaining under advisement, affirms the judgement of the Superior Court in it entirety. The one issue remaining to be decided deals solely with whether or not House District 2 of the plan satisfies the requirements of Article VI, Section 6 of the Alaska Constitution. The issue is completely unrelated to the federal questions raised in the case and its outcome will in no way affect those questions.

Generally, the final judgement rule precludes review where anything further remains to be determined by a State Court, no matter how dissociated it may be from federal issues which have been finally adjudicated by the highest court

of the State. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), this Court recognized certain exceptions to the rule. One exception exists where the federal issue which has been finally decided will survive and require decision regardless of the outcome of any further state court proceedings. That is the situation in this case. The federal issues are entirely independent of the issue remaining under advisement. They are completely severable. The Alaska Supreme Court has passed on the merits of the federal question by affirming the judgement of the Superior Court and its Order should be treated like any other order affirming the judgement of a lower court.

B. APPELLANT HAS STANDING.

Appellant's attempt to amend her

complaint was not a concession that she lacked standing, but merely an effort to eliminate an unnecessary side issue by alleging additional jurisdictional facts. Appellant's pleadings, as they now stand, meet the jurisdictional requirements of this Court.

Appellee contends that Appellant has shown no injury because she failed to allege that she resides in an underrepresented district. This Court has never held the such an allegation is necessary to establish standing in an apportionment case. In Baker v. Carr, 369 U.S. 186, 205, n.24 (1962), the Court specifically declined to decide that issue. However, the issue arose and was dealt with by the Court in Swann v. Adams, 385 U.S. 440 (1966). In that case the court upheld the standing of plaintiffs who conceded that their districts had received

constitutional treatment under the challenged plan.

Since the plaintiffs in Swann did not allege that they resided in disadvantaged districts, what injury enabled them to satisfy the case or controversy requirements of Article III, Section 2 of the United States Constitution? The Court makes reference to the fact that the plaintiffs had presented the District Court with an alternate apportionment plan which it had rejected, 385 U.S. at 443. But, that rejection can hardly be considered to be the injury which gave the District Court jurisdiction in the first place. The Court also noted that the District Court had consistently denied intervention to other plaintiffs, seemingly treating the appellants as representing other citizens in the State. Id. But, if plaintiffs had alleged no personal injury, how did the District

Court have the jurisdiction necessary to permit them to represent other citizens of the State?

The standing decision in Swann can only be interpreted as a recognition of the principle that any registered voter has a sufficient enough interest in the apportionment of legislative districts that he suffers injury from an improperly drawn plan. The Court of Appeals of Maryland has interpreted Swann in exactly that manner in upholding the standing of an "overrepresented" voter to challenge a municipal apportionment plan. DuBois v. City of College Park, 375 A.2d 1098 (Md. 1977).

The principle underlying Swann has also been recognized by other state courts. The Oklahoma Supreme Court, in Jones v. Freeman, 146 P.2d 564 (Okla. 1943), noted:

> But a citizen has more than the mere right to have his own county or

> district fully represented in the Legislature. Discrimination may result from giving other counties too much representation as well as from giving a particular county insufficient representation. Each citizen has a right to have the state apportioned in accordance with the provisions of the Constitution and to be governed by a legislature which fairly represents the whole body of the electorate, elected as required by the provision of the Constitution.

Id. at 571.

In Stiglitz v. Schardien, 40 S.W. 2d. 315 (Ky. 1931), the Kentucky Supreme Court (formerly the Court of Appeals) considered a challenge to the standing of a plaintiff whose district's population was reasonably close to the ideal population. The court upheld plaintiff's standing, stating that:

> Every citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution. If is not enough that one district may be of the proper size theoretically, so long as other districts are given greater representation than is warranted by

> the Constitution and their population. The discrimination is just as real and just as wrong whether is be based upon a denial of representation to one locality or be founded upon excessive representation given to another. Indeed, it necessarily operates to bring both results, and in either case the constitutional standard of equality is destroyed. ...If one district is approximately the size that all districts should be, and another district with half the population is given the same or greater representation, the result is inequality in the Legislative Assembly.

Id. at 317.

The Swann decision incorporates these principles in its ruling that all voters suffer harm from a malapportionment. This harm provides the injury necessary for a plaintiff from an overrepresented district to satisfy the Article III requirement of a case or controversy.

But Swann must also be interpreted in light of other rules of prudential standing established by this Court. It has long been the rule that a federal

court will decline to exercise its jurisdiction if the alleged injury is a generalized grievance shared in substantially equal measure by all or a large class of citizens. Worth v. Seldin, 422 U.S. 490 (1975). The rationale for this rule is that when all citizens are equally harmed by some alleged governmental illegality, recourse is possible through the political process. Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975). Swann creates an exception to the generalized grievance rule. It recognizes that, in an apportionment case, any effective recourse to the political process may be barred by the very injury being alleged. The Swann Court was well aware of the long history of futile attempts to solve the problem of malapportionment by recourse to malapportionment by recourse to malapportioned legislatures and it provided for judicial recourse.

Appellee also asserts that Appellant lacks standing to raise claims relating to the military. Although the general rule is that one person does not have standing to assert the constitutional rights of another, Tileston v. Ullamn, 318 U.S. 44 (1943), the doctrine is recognized as a rule of practice which may be dispensed with under special circumstances. Barrows v. Jackson, 346 U.S. 249 (1953). Here again, Swann creates an exception to a prudential standing rule for apportionment cases. Under Swann, Appellant's injury results from any defect in the apportionment plan. In order to remedy those defects she must be able to raise any issue relating to them. Since the defects she alleges relate to Appellee's treatment of the military, her remedy is inextricably tied to the assertion of their rights. If she were not allowed to raise those issues, there

would be no remedy for the injury which Swann recognizes.

An additional factor to consider is that it is now impossible for military and military-related persons to assert those claims for themselves. Article VI, Section 11 of the Alaska Constitution provides for an extremely short 30 day statute of limitations on challenges to an apportionment proclamation. Any attempt by a member of the military to raise the issue is now barred by that constitutional provision.

The inequitable apportionment of the Alaska legislature caused by Appellee's discrimination against the military will be allowed to stand until the 1992 elections unless Appellant's standing to present their claim is recognized.

Appellant meets the standing requirements which Swann establishes for apportionment cases. She has alleged

that she is a qualified voter and she has alleged that the challenged plan contains errors which result in a malapportionment and substantial population variances among the districts. Those allegations are sufficient to establish her standing under Swann v. Adams.

C. APPELLANT'S THIRD QUESTION WAS RAISED BELOW.

Appellant's third question was raised in both the trial court and the Alaska Supreme Court. The issue was briefed at both levels. Plaintiff's Trial Brief, p. 9 - 10; Appellant's Alaska Supreme Court Brief, pp. 14-15. It is fairly included within both Issues 2 and 5 of Appellant's points on appeal to the Alaska Supreme Court.[1]

1.

THE ISSUES PRESENTED

2. Whether the residency test applied only to military personnel and their dependents discriminates

against military personnel and their dependents by subjecting them to a higher standard of citizenship than the rest of the population.

5. Whether the use of a future intent test, while unconstitutional as applied to certain groups for voting purposes, is constitutionally permissible as applied to the military for reapportionment purposes.